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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2225 OF 2004
IN
SUIT NO.3007 OF 2002

Kewal Krishan Tewari and another)..Plaintiffs

Versus

Balram Sharma and another)..Defendants

Mr.Sanjay Jain i/b.Mr.Lalit V. Jain for the Plaintiffs.
Mr.Yogeshwar S. Bhate for the Defendants.

CORAM : SMT. NISHITA MHATRE, J.

DATED : 7TH JULY 2006

P.C.:

. The Defendants have taken out the present Motion for rejection of the Plaint under Order VII Rule 11 of the Civil Procedure Code. According to the Defendants, the Suit has been filed for an injunction, which prayer cannot be sought from this Court. The other relief claimed in the Suit is in respect of payment of mesne profits which, according to the Defendants, can be claimed only as a consequence of a prayer for possession. There is no prayer made for possession of the suit premises being Flat No.14 in the building Versova View Co-operative Housing Society Ltd., Four Bungalow Road, Andheri (West), Mumbai 400059. It is, therefore, urged on behalf of the Defendants that the Suit be rejected. It is submitted that the Plaintiffs

have taken contrary pleas that Defendant No.1 is a gratuitous licensee, a care taker and also that the Defendants are rank trespassers. Reliance is placed on certain averments made in the Plaint to indicate that the Defendants were paying the outgoings in respect of the maintenance for the flat. It is, therefore, claimed by the Defendants that the Suit is not maintainable in this Court. A Suit filed by Defendant No.1 being RAD Suit No.317 of 3003 for a declaration that Defendant No.1 is a tenant is pending before the Small Causes Court. Defendant No.1 submits that the Plaint needs to be rejected for non-disclosure of all these material facts.

2. The learned Advocate appearing for Defendant No.1 places reliance on the judgments in the case of *S.P. Chengalvaraya Naidu (Dead) by LRs.* vs. *Jagannath (Dead) by LRs. and others*, **(1994) 1 SCC 1** and *I.T.C. Limited* vs. *Debts Recovery Appellate Tribunal and others*, **AIR 1998 SC 634**, in support of his submission that non-disclosure of material facts would amount to the Plaintiffs playing fraud on this Court. The Suit is, therefore, liable to be dismissed, according to Defendant No.1.

3. In support of the Plaintiffs' contention, it has been urged that Defendant No.1 having failed in the Motion taken out by the Plaintiffs, is seeking to scuttle the Suit by taking mischievous and unwarranted

pleas. This Court while deciding **Notice of Motion No.3370 of 2003** (*Kewal Krishan Tewari and another* vs. *Balram Sharma and another*) had granted interim relief to the Plaintiffs. While disposing off the Motion, Bobde, J. on 30th June 2003, has observed thus : "... One thing is clear at this stage that the Defendants have not set up a plea of tenancy in the affidavit in reply nor a plea of licence. In all probability, the Plaintiffs version that the Defendant No.1 was a care taker appears to be prima facie true." An observation has also been made that the Defendants have not shown any evidence of payment of rent or compensation charges and, therefore, the version of the Plaintiffs that Defendant No.1 was a care taker has been accepted. This plea has been raised by the Defendants in the Written Statement filed on 10th September 2003.

4. In my view, Defendant No.1 is not entitled to the reliefs claimed in the Motion. The Suit has been filed for injunction and mesne profits. The mesne profits are claimed @ Rs.25,000/- per month from August 2002 when the notice terminating what appears to be a gratuitous license was issued. For this purpose the Plaintiff has paid Court Fee by evaluating the amount as Rs.75,000/-. In my view, this prayer cannot be obtained before any other Court and must be decided in this Court.

5. Hence, Notice of Motion dismissed.